

J96Wniss

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA,

v.

17 Cr. 477 (PAE)

JASON NISSEN,

Defendant.

Sentence

-----x

New York, N.Y.  
September 6, 2019  
9:30 a.m.

Before:

HON. PAUL A. ENGELMAYER,

District Judge

APPEARANCES

GEOFFREY S. BERMAN

United States Attorney for the  
Southern District of New York

BY: DOUGLAS S. ZOLKIND

LARA E. POMERANTZ

Assistant United States Attorneys

MICHAEL F. BACHNER

HOWARD S. WEINER

Attorneys for Defendant

Also Present: Special Agent Lauren Calvello, FBI

J96Wniss

(Case called)

MR. ZOLKIND: Good morning, your Honor. Douglas Zolkind and Lara Pomerantz, for the government. We're joined at counsel table by Lauren Calvello of the FBI.

Also, behind us, your Honor, are two representatives of Kroll in case the Court has any questions regarding Kroll's analysis.

THE COURT: OK. Very good. Thank you.

Good morning, Mr. Zolkind.

Good morning, Ms. Pomerantz.

Good morning, Agent Calvello.

And thank you in advance to the Kroll representatives for the work that they performed, and I appreciate your being here today.

I don't offhand think it likely that I'll need to inquire of them, but I appreciate, counsel, you making them available.

For the defense.

MR. BACHNER: Good morning, your Honor. Michael Bachner and Howard Weiner of my office on behalf of Jason Nissen, your Honor. Mr. Nissen is, obviously, standing to my right.

THE COURT: Good morning, Mr. Bachner.

Good morning, Mr. Weiner.

And of course, good morning to you, Mr. Nissen.

J96WnissS

1 THE DEFENDANT: Good morning, your Honor.

2 THE COURT: Good morning as well to the members of the  
3 public who are here today.

4 Let me just ask you, Mr. Bachner, whether any of the  
5 people who are here are friends or family of your client.

6 MR. BACHNER: Yes, your Honor.

7 THE COURT: All right. Can you point them out.

8 MR. BACHNER: I only know some. I know many of them  
9 are Mr. Nissen's fraternity members and people he's done  
10 business with.

11 Haydee Nissen, his wife, is in the first row, and I  
12 think these are family members of Haydee's.

13 THE COURT: OK.

14 Welcome. Thank you for being here. I appreciate your  
15 presence.

16 Government, are there any representatives of the  
17 victims who are here today?

18 MR. BACHNER: Your Honor, I'm not sure. We've been in  
19 close contact with the office of the victim witness  
20 coordinator, and we know that the victims have all been  
21 notified today and are aware. Whether any are here today, we  
22 have no control.

23 THE COURT: All right.

24 Let me just ask to see a show of hands. Is there  
25 anybody here who is either a victim or a representative of one

J96WnissS

1 of the victims in this case?

2 All right. You are, sir? Just keep your voice up.  
3 Who are you?

4 MR. RAPS: My name is Paul Raps, and I'm representing  
5 Taly.

6 THE COURT: And you represent?

7 MR. RAPS: Taly.

8 THE COURT: Taly. All right. Very good.

9 Any other hands?

10 All right. Good morning, Mr. Raps, and thank you for  
11 being here today.

12 All right. We're here today to resume and complete  
13 the sentencing hearing for defendant Jason Nissen that began on  
14 September 21 of last year. At that initial hearing, the Court  
15 took up a number of preliminary matters relating to sentencing.  
16 I incorporate by reference here all that was said and  
17 accomplished at that proceeding for those matters.

18 For the benefit of those present today who weren't at  
19 the initial hearing, I want to briefly recap what was covered  
20 then.

21 First of all, I made a record of the materials,  
22 voluminous materials, that had been submitted as of that date  
23 in connection with this sentencing.

24 Second, I confirmed that all parties had received the  
25 presentence report, and I gave the parties an opportunity to

J96WnissS

1 make factual objections to the presentence report. For the  
2 most part, the parties did not object to the PSR, although  
3 there is one small, discrete outstanding factual item regarding  
4 the PSR that I will take up shortly that is not of any apparent  
5 consequence.

6 Third, I confirmed that all the parties agreed with  
7 the probation department's calculation on the advisory  
8 sentencing guidelines range. Specifically, the guidelines as  
9 calculated by the probation department recommend a sentence of  
10 between 97 and 121 months in prison based on an adjusted  
11 offense level of 30 and a criminal history category of I. The  
12 Court found that that is, in fact, the correct calculation of  
13 the advisory guidelines.

14 Finally, I had an extended discussion with counsel  
15 about an opening potential issue of potential considerable  
16 importance, and that is what became of the more than \$70  
17 million that were the fruits of the fraud to which Mr. Nissen  
18 has pled guilty. The presentence report has made a reference  
19 or two to Mr. Nissen's having acted, in part, "to enrich  
20 himself." One of the victims in this case, the lender Taly USA  
21 Holdings, had written a letter to the Court which posited that  
22 \$10 million obtained by Mr. Nissen was missing and had been  
23 stashed away for Mr. Nissen's future use, perhaps, on a  
24 Caribbean island.

25 The government furnished the Court with that letter

J96WnissS

1 without suggesting that it had any doubts about that factual  
2 representation, and so the Court took up the issue with  
3 counsel. It became apparent that the government and its case  
4 agents, due to the way the case had come in, had not  
5 investigated independently what had become of the fruits of the  
6 fraud. And it also became clear that that there had not really  
7 been any systematic investigation into that, although it was  
8 the case that Mr. Nissen, through his counsel, denied using the  
9 fruits of the fraud for his personal benefit.

10 At the September 21, 2018, hearing, I tasked  
11 government counsel, ultimately, with reconstructing factually  
12 what had become of the more than \$70 million and specifically  
13 whether, if so, to what extent Mr. Nissen had received any  
14 personal financial benefit from the fraud. Ultimately, the  
15 investigative firm, Kroll, which has been assisting in  
16 Mr. Nissen's related bankruptcy proceedings, took on that  
17 assignment, supervised effectively by counsel from both sides.

18 With that preface, let me recap what has happened in  
19 the almost one year since the initial hearing. Since then I've  
20 received the following materials.

21 I've received a series of status letters from the  
22 government and the defense as to the Kroll investigative work  
23 that was being undertaken. These included letters dated  
24 November 2 and December 17 of 2018 and February 15, April 15  
25 and June 13, 2019. And I've received a letter from the

J96Wniss

1 defense, dated July 11, asking for a final adjournment of the  
2 deadline I had set to submit findings to the Court.

3 All of this culminated in a joint letter I received,  
4 dated July 29, 2019, which set out both Kroll's findings and  
5 the parties' perspectives on it. The letter is docketed at  
6 Dkt. 71. I'm not going to purport to summarize it all here.  
7 Kroll's central findings were that the accusation that there  
8 was \$10 million of missing or hidden funds was factually wrong.  
9 Kroll, to a very detailed extent, was able to trace the funds  
10 and found that 94 percent of the aggregate dollar amount of the  
11 defendant's disbursements were most likely business-related;  
12 that approximately \$564,349, comprised of about 400  
13 transactions, were, to a high degree of confidence, personal in  
14 nature; and that approximately \$483,670 relating to the  
15 Mandalay Bay casino were likely personal expenditures; and  
16 therefore a total of about \$1,040,000 were likely personal in  
17 nature.

18 The letter also set out the defense's view that these  
19 sums should be viewed as offset by \$60,000 that had been paid  
20 to NECO employees and \$150,170 paid by pre-Falcon funds. The  
21 letter also set out the defense's view that the personal  
22 expenditures should be viewed as also offset by loans made to  
23 the company and salary payments that Mr. Nissen was entitled to  
24 but did not take.

25 On July 30, 2019, I issued an order, docketed at Dkt.

J96WnisS

72, stating my view, based on my review of that letter, that although the parties differ about the significance and meaning of certain matters, such as Mr. Nissen's not having taken his full authorized salary, there did not appear to be any further disputes of fact, and therefore, I scheduled sentencing today.

That's the recap of what brought us to this place.

Before I invite each side to be heard with respect to sentencing, there are a couple of housekeeping matters I need to take up.

To begin with, other than the submissions that I listed at the initial sentencing proceeding that I just listed, has anything else been submitted in connection with this sentencing?

MR. ZOLKIND: Your Honor, this morning we submitted a consent order of forfeiture and a proposed order of restitution.

THE COURT: Right. And the consent order of forfeiture is identical to the one I referred to last year save that it freshens up the date.

MR. ZOLKIND: Exactly right.

THE COURT: OK.

MR. ZOLKIND: Your Honor, could I offer one minor point of clarification to something the Court just said?

I think the Court said that Kroll's work was effectively supervised by both the government and the defense.



J96WnissS

1 I just want to be very clear. Kroll's work was supervised by  
2 the government. Certainly they received input and met with the  
3 defense, but I just want to be clear that they were under the  
4 supervision of the government.

5 THE COURT: OK. Thank you. I think that's a more  
6 helpful way of putting it. What I really meant to capture, but  
7 you put it better, was that the defense was actively consulted  
8 in the process to make sure that nothing was missed.

9 Do I have that right?

10 MR. ZOLKIND: Yes, your Honor.

11 THE COURT: Mr. Bachner, anything else besides what I  
12 have listed?

13 MR. BACHNER: Your Honor, just to make sure, the  
14 November 19, 2018, letter we submitted to the Court, which was  
15 an upgraded diagnostic evaluation of Mr. Nissen's youngest  
16 daughter, Elisabeth.

17 THE COURT: Yes. Thank you. I appreciate that.  
18 You're right; I forgot to --

19 MR. BACHNER: No problem, your Honor.

20 THE COURT: -- mention that, I think because it was  
21 not on the public docket.

22 MR. BACHNER: Correct.

23 THE COURT: OK.

24 Second of all, at the last hearing, September of last  
25 year, there was one small unresolved issue from paragraph 110

J96Wniss

1 of the presentence report. It had stated that the defendant  
2 had not yet filed his 2015 to 2017 tax returns. Footnote 1 of  
3 the July 29 joint letter reports that those returns have now,  
4 in fact, been filed.

5 Is that correct?

6 MR. BACHNER: Yes, Judge.

7 THE COURT: Government, do you agree?

8 MR. ZOLKIND: Yes, your Honor.

9 THE COURT: All right. Then I will amend paragraph  
10 110 to reflect that, in fact, the returns have been filed.

11 Third, and finally, am I correct that with all of the  
12 ground I've covered, there are no longer any factual disputes  
13 arising out of the work that Kroll did analyzing the  
14 defendant's expenditures?

15 MR. ZOLKIND: We agree, your Honor, that there is no  
16 material dispute of fact.

17 THE COURT: All right.

18 MR. BACHNER: Agreed, your Honor.

19 THE COURT: Very well.

20 And again, I understand that the parties take  
21 differing views as to the meaning of certain events, but the  
22 events themselves appear to be undisputed.

23 Having taken care of all those necessary  
24 preliminaries, we now come to the heart of the matter, which is  
25 the parties' views with respect to sentencing.

J96Wniss

1 Government, I'd like to ask you to speak first, but  
2 just as a preface, apart from the two victim letters that I've  
3 received, I just want to pursue something we covered long ago.  
4 You have given notice to the victims of this proceeding.

5 MR. ZOLKIND: Yes, your Honor.

6 THE COURT: And do you know if any victims seek to  
7 speak here today?

8 MR. ZOLKIND: We have not been informed of any victims  
9 wishing to speak.

10 THE COURT: All right. Let me ask Mr. Raps, who is  
11 the one victim representative who is here. You have not  
12 indicated an interest in speaking for your client. Although I  
13 have received your letter, I'm extending you the opportunity.  
14 Is that something you wish to do today?

15 MR. RAPS: No.

16 THE COURT: All right. Thank you.

17 Since a couple of people have come in since the  
18 proceeding began, has any other representative of a victim  
19 appeared today?

20 OK. Very good.

21 Government, I'd be happy to hear from you.

22 MR. ZOLKIND: Thank you, your Honor.

23 Your Honor, the government will, I think, primarily  
24 rely on the sentencing submission that we provided to the Court  
25 in advance of the originally scheduled date, but let me add a

J96Wniss

few additional points and factors of mitigation.

It is our view, your Honor, and continues to be adamantly the government's view, after the Kroll analysis, that the defendant perpetrated an extremely serious fraud. Real victims, real people lost more than \$70 million because they were duped by the defendant's lies. And the government submits that the conduct here calls for a meaningful sentence.

Let me just talk a little bit about the offense conduct, and I do think it is important to acknowledge that, from our understanding, it appears that the defendant started his business with what, from all appearances, seems to be pure enough intentions. This doesn't seem to be the kind of case where the defendant set out from the outset to perpetrate fraud. At least that's not what our investigation has indicated.

THE COURT: Well, you're using the word "seems." I mean, it seems to me undisputed that that's the case; that this was a legitimate business that got into trouble, he made the wrong call and turned it into a fraud.

MR. ZOLKIND: Exactly.

I'm simply acknowledging something of a mitigating factor. It appears that he set out, we don't dispute he set out, to run a legitimate business.

THE COURT: Right.

MR. ZOLKIND: But at some point around 2015 or a

J96Wniss

1 little earlier, the company was running into financial  
2 problems. He didn't have enough capital to pay his debts, and  
3 the defendant was faced with a choice. And again, I think it's  
4 critical to recognize that he had a choice.

5 He's a sophisticated businessperson. He could have  
6 dealt with his financial predicament responsibly. He could  
7 have tried to refinance the loans or filed for bankruptcy or  
8 done any other number of things, but he made the decision to  
9 cheat and lie. He wasn't pressured into it. He wasn't acting  
10 out of some mistake. That was his decision, and so he  
11 approached new lenders, one of whom, Falcon, loaned more than  
12 \$40 million to him ultimately. And in often cases he went to  
13 people that knew him, people that trusted him. And he hid from  
14 those people -- those lenders, investors -- information that  
15 was highly material. So, perhaps most material, he hid the  
16 extent to which he was already indebted to other lenders. And  
17 so at that point the scheme became essentially a Ponzi scheme,  
18 where he was taking in money from new lenders and using that  
19 money in the main to repay other lenders rather than using it  
20 to run his business.

21 THE COURT: There was a small amount of the money that  
22 was explicitly earmarked for old lenders, but that turned out  
23 to be a fraction of the money that was, in fact, used to pay  
24 old debts.

25 MR. ZOLKIND: That's right, your Honor. And just as

J96Wniss

1 true some of the money that came in from the new lenders was  
2 used to buy tickets and run the business but not nearly to the  
3 extent that was represented.

4 He also falsely inflated his company's sales data to  
5 make it appear that the company was thriving when the exact  
6 opposite was true. In certain cases he used programs like  
7 Photoshop to falsify financial statements. He went to  
8 significant lengths to hide this fraud from everyone else in  
9 his company, including the CFO. And so, I think we've seen in  
10 some of what the defense has said the suggestion that he was  
11 running a legitimate business during this period, and we  
12 vigorously disagree with that characterization.

13 Among other things, Kroll's investigation confirmed  
14 that the defendant's recordkeeping was egregious; that there  
15 was really no effort made to segregate personal expenditures  
16 from business expenditures.

17 One example of how the business was run is that --  
18 there's an individual, Jona Rechnitz, who's been a government  
19 cooperator in other cases; that person helped to bring in  
20 investors to the defendant's business, and the defendant  
21 compensated Rechnitz, in large part, by paying off his American  
22 Express for the purpose, as we understand it, to disguise the  
23 fact of those payments and to try to avoid income taxes.

24 THE COURT: Avoid income tax payments by Rechnitz.

25 MR. ZOLKIND: That's right.

J96Wniss

1 THE COURT: He was facilitating Rechnitz's evasion.

2 MR. ZOLKIND: That's correct.

3 THE COURT: I don't think that's in the PSR. You're  
4 not asking me to treat as any an aggravating fact any aiding  
5 and abetting of a Rechnitz tax scheme, right?

6 MR. ZOLKIND: We're not, your Honor. I'm just  
7 pointing it out as part of the description of how the business  
8 was run.

9 THE COURT: Understood.

10 MR. ZOLKIND: Now, I do want to acknowledge another  
11 mitigating factor, which is not insignificant, that the  
12 defendant of his own accord, came in, met with the government  
13 and disclosed virtually the full extent of his fraud. That is  
14 not common -- it doesn't happen -- and saved the government  
15 considerable resources, and it deserves recognition.

16 I think it is also certainly fair to say that the  
17 business was crumbling at that point and highly likely that  
18 this all would've been --

19 THE COURT: Disclosure was inevitable; it was just a  
20 matter of time.

21 MR. ZOLKIND: I think that's right. There was really  
22 no question.

23 It is also not insignificant that, as Kroll found,  
24 this was not a case like, say, Bernie Madoff or something like  
25 that, who was running a Ponzi scheme, hiding the assets

J96Wniss

1 offshore, funding an exorbitant lifestyle. He was using the  
2 money in part for his own personal benefit, but that doesn't  
3 seem to have been the main driver here.

4 THE COURT: Mr. Bachner's point is right, isn't it,  
5 that if the point of this was personal enrichment, there was  
6 low-hanging fruit that he didn't take, like the authorized  
7 salary he didn't take.

8 MR. ZOLKIND: That's right.

9 THE COURT: So, while it's true that the sloppy nature  
10 of the rest of the business led him to pay in its entirety  
11 American Express bills that only partly subsumed business as  
12 opposed to personal costs, it's also the case that he left some  
13 personal compensation untapped.

14 MR. ZOLKIND: That's right. I mean, clearly he was  
15 trying to make his business bigger and more profitable, which  
16 would have ultimately inured to his significant personal  
17 benefit if it had worked, but he couldn't sustain the scheme,  
18 as is often the case with Ponzi schemes.

19 Your Honor, I guess I would close, if I could, just by  
20 referring to some of the statements made by the victims,  
21 because I think they help to reinforce that even though the  
22 money in this case came from hedge funds and entities that are  
23 often perceived as having unlimited net worths, or close  
24 thereto, at its heart, there were real people that were harmed  
25 by this.



J96Wniss

1           As the principal of Taly USA Holdings put it, he said:  
2       "This is not a victimless crime. Futures have been destroyed.  
3       Life savings have been depleted." He went on to say that while  
4       his companies may sound like faceless corporate entities,  
5       they're not. They are companies of people who rely on them for  
6       their livelihoods.

7           If I could quote just one more victim?

8           THE COURT: Of course.

9           MR. ZOLKIND: Dean Landis Credit Cash said, and I  
10       quote: "My family and I were, and continue to be, severely  
11       impacted by this crime. I own and manage a relatively small  
12       business. The financial loss has been devastating. Upon  
13       realizing that I'd been defrauded and would perhaps lose  
14       millions of dollars, I was crushed. The immediate shock that  
15       and toll on me was worse than any feeling I had ever had. I  
16       was worried for my business's survival, my family's well-being  
17       and my employees' confidence that we could withstand such a  
18       catastrophe."

19           For all these reasons, the government recommends a  
20       sentence within the guidelines.

21           THE COURT: Let me follow up just on a few things, but  
22       just as a matter of housekeeping, we have the consent  
23       preliminary order of forfeiture, which you have given me with  
24       the new dates, and I'll check in a moment with the defense, but  
25       I intend to sign that.

J96Wniss

1           You've also given me, though, an order of restitution  
2           which does not quite track with what the presentence report  
3           recommends.

4           MR. ZOLKIND:   Yes.

5           THE COURT:   I have not checked whether the numbers  
6           match.   Let me begin with that.   Do the numbers match what's in  
7           the presentence report?

8           MR. ZOLKIND:   I can explain that, your Honor.

9           The order of restitution we provided to the Court  
10          matches the amount in the forfeiture order.   It is, I think,  
11          \$150,000 less than the amount in the PSR, and that is because  
12          subsequent to providing information to the probation office  
13          that they then incorporated into the PSR, we determined, in  
14          discussions with defense counsel and with counsel to Falcon,  
15          that in our calculations we had added \$150,000 to Falcon's loss  
16          that was not correct.   They've agreed that that was not  
17          correct, and the defense and the government are in accord.

18          THE COURT:   All right.   So, the figures in the  
19          schedule of victims attached to the proposed restitution order  
20          are correct, and those supersede those in the presentence  
21          report.

22          MR. ZOLKIND:   That's correct.

23          THE COURT:   All right.

24          The presentence report has a familiar provision under  
25          which the defendant is to pay a portion of his income over time

J96Wniss

1 towards unpaid restitution. The order of restitution you have  
2 given me, which is quite brief, contains the following  
3 arresting statement:

4 "The defendant sham complete restitution payments  
5 within 90 days of the entry of this order."

6 It says nothing about any obligation as to unpaid  
7 restitution. What does that sentence mean? You're not  
8 representing that the defendant has even a fraction of the  
9 restitution amount in hand or coming to him in 90 days. What  
10 does that sentence mean?

11 MR. ZOLKIND: You're absolutely right, your Honor. I  
12 apologize for that.

13 THE COURT: That just seems derived from some other  
14 case.

15 MR. ZOLKIND: It must be, your Honor.

16 THE COURT: All right.

17 MR. ZOLKIND: My apologies.

18 THE COURT: No worries. I'm just trying to make this  
19 workable.

20 Let me put out the following, which is, under the law,  
21 the Court can give counsel an extension of time after a  
22 sentencing to submit a restitution order. Subject to what I  
23 hear from the defense, it's my expectation that I would want to  
24 order restitution with the same numbers that you have but that  
25 contains a provision akin to that in the presentence report

J96Wniss

1 that embeds an ongoing obligation reflected as a portion of  
2 income for Mr. Nissen to be paying restitution, and beyond  
3 that, I would be making the order of restitution a condition of  
4 supervised release. And I expect that the formation of the  
5 supervised release term, on the likely assumption that  
6 restitution remains then outstanding, that the U.S. Attorney's  
7 Office victim unit would convert that supervised release term  
8 into a consent judgment so that the victims can continue to  
9 pursue the restitution from Mr. Nissen even after supervised  
10 release is done.

11 Isn't that the right way to proceed here?

12 MR. ZOLKIND: Yes, your Honor.

13 THE COURT: All right. How much time do you think  
14 before it would take to conform the order of restitution  
15 essentially to terms along those lines?

16 MR. ZOLKIND: Would one week be acceptable?

17 THE COURT: More than acceptable. That's quite fast.  
18 That's fine. We'll come back to that at the end of sentencing,  
19 but the important thing is that the numbers here are correct.  
20 But I think the actual text is going to need some work.

21 MR. ZOLKIND: Thank you, your Honor.

22 THE COURT: All right.

23 The final question really involves the last thing you  
24 said. At the beginning of your remarks, you said you wanted a  
25 meaningful sentence. At the end, you were phrasing something

J96Wniss

1 that was said in the sentencing letter of more than a year ago.  
2 The government asked for a sentence within the guideline range.  
3 Is it the government's view that there's no sentence below 97  
4 months that could reasonably take into account the 3553(a)  
5 factors?

6 MR. ZOLKIND: Your Honor, the way we've approached it  
7 is that we look at the amount of the fraud, the way it was  
8 perpetrated, and we think that those factors solidly call for a  
9 guidelines sentence. And then we've looked at whether the  
10 mitigation is such that it would take this case out of our  
11 ordinary practice of recommending a guidelines sentence.

12 THE COURT: Your view is that that justifies -- that  
13 would make a sentence of anything less than 97 months  
14 unreasonable.

15 MR. ZOLKIND: Your Honor, I won't say that we think a  
16 sentence below 97 months would be unreasonable. I think  
17 there's a range of sentences that could be reasonable in this  
18 case.

19 THE COURT: I agree with that. Under the parsimony  
20 principle, the Court has to choose the lowest of the reasonable  
21 sentences, and that's why, while I appreciate your advocacy  
22 that a guidelines is among the reasonable outcomes here --

23 MR. ZOLKIND: Yes.

24 THE COURT: -- the question for me is not that; it's  
25 what the lowest of the reasonable sentences is, and so I'm

J96WnissS

1 putting it to you. Is it really the government's view that no  
2 sentence below the guideline range would reasonably take into  
3 account the 3553(a) factors?

4 MR. ZOLKIND: Your Honor, I would not say this is the  
5 kind of case where our position is that no sentence dipping  
6 below 97 months could be reasonable. And so I think, in our  
7 view, a guidelines sentence is reasonable in this case, but we  
8 do recognize that there are mitigating factors that distinguish  
9 this case from other, significant frauds, so we certainly  
10 acknowledge that and recognize that a sentence below 97 months  
11 could be reasonable.

12 THE COURT: Does the government have a fear when  
13 Mr. Nissen is at liberty again of his committing another crime?  
14 Is that a realistic consideration here?

15 MR. ZOLKIND: Sure. I think so.

16 THE COURT: Why?

17 MR. ZOLKIND: Well, he doesn't have a significant  
18 criminal history.

19 THE COURT: He doesn't have a criminal history.

20 MR. ZOLKIND: He doesn't, correct.

21 So, this is not a case where someone has been  
22 committing frauds all their adult life, but at the same time,  
23 it was a serious fraud. It was not a rash decision. It was  
24 the kind of thing done over time in a very deliberate manner,  
25 and so I think there is reason to be hopeful that he has

J96Wniss

1 learned his lesson, and certainly the fact that he brought it  
2 to the government's attention is reason to be optimistic in  
3 that regard. And I think a sentence of imprisonment would help  
4 certainly to reinforce that deterrent, so I think there's  
5 certainly reason to be hopeful that he won't return to  
6 committing this type of fraud again. But do I think it is  
7 something that -- the need for deterrence is something that  
8 should factor into the Court's sentencing decision?

9 Absolutely.

10 THE COURT: OK. Thank you very much. All right.  
11 Very helpful.

12 Mr. Bachner, before I ask more systematically for your  
13 views, let me take care of some of the loose ends. You consent  
14 to the order of forfeiture, correct?

15 MR. BACHNER: Yes, your Honor.

16 THE COURT: All right.

17 As to restitution, you're in agreement with the  
18 numbers that the government now proposes.

19 MR. BACHNER: We are in agreement.

20 This is something to work out later. As I understand  
21 it, there were moneys that have been recovered by the trustee  
22 in bankruptcy in the estate, so that number ultimately will  
23 be -- the obligation ultimately from Mr. Nissen will be lower,  
24 but that is the amount of the restitution.

25 THE COURT: Let me put it this way. For the purposes

J96Wniss

1 of the restitution order, do you agree with the numbers the  
2 government has now proposed?

3 MR. BACHNER: Yes, Judge.

4 THE COURT: Understanding that some of the sequelae  
5 from the bankruptcy may result in payments that are applied to  
6 those numbers.

7 MR. BACHNER: Correct.

8 THE COURT: That's what you're saying.

9 MR. BACHNER: Yes.

10 THE COURT: All right. Any reason why, then, I  
11 shouldn't give the government a short period of time to modify  
12 the restitution order to embed an ongoing payment obligation by  
13 Mr. Nissen?

14 MR. BACHNER: We're in full agreement with that,  
15 Judge.

16 THE COURT: Do you have any sense right now of what  
17 money, including through the bankruptcy, is, in practice, going  
18 to be available? I mean, what is it that can be collected  
19 through the bankruptcy process that ultimately, net of  
20 bankruptcy relevant costs, is likely to be available for the  
21 victims?

22 MR. BACHNER: Judge, I've heard the number of about 5  
23 million bandied around, but I don't know that for a fact.

24 THE COURT: OK. All right. Thank you very much.

25 Having taken care of then just restitution and



J96Wniss

1 forfeiture, anything you want to say on those subjects?

2 MR. BACHNER: No, Judge.

3 THE COURT: I'm happy to hear from you more broadly  
4 then.

5 MR. BACHNER: Thank you, your Honor.

6 Judge, first of all, we want to thank the Court for  
7 the one-year delay that you suggested and ordered in this case,  
8 because I think it's indicative of the attention that your  
9 Honor -- I don't mean to be -- but it's just how I feel, that  
10 this is indicative of the attention that your Honor has given  
11 to the case and the significance, I think, your Honor, we hope,  
12 will be implying in the motives Mr. Nissen had in committing  
13 what is clearly a serious crime.

14 Judge, I've been doing this -- sometimes I hate to  
15 admit it, because it's hard to believe; it's been about 35  
16 years as a defense lawyer and four years prior to that as a  
17 prosecutor, and in all the years I've been doing this, it never  
18 ceases to amaze me that the hardest part of my job is doing  
19 what I'm doing now, but I would never switch places with a  
20 judge, in a heartbeat. I couldn't do it. The need and the  
21 purpose of sentencing a defendant is such a monumental task,  
22 and I know that is why your Honor has done what you've done,  
23 delaying the sentence for as long as you need to get all of the  
24 facts, to make the right decision.

25 In my representation, I know in front the courts you

J96WnissS

1 see a lot of bad folks who come in front of you who have done a  
2 lot of bad things in the past and sometimes have done bad  
3 things for the first time, but there's really serious  
4 indications that these people are oftentimes people who have  
5 made often a lot of very bad choices and have sometimes earned  
6 the title of being kind of bad people, either through their  
7 criminal history category, etc.

8 And sometimes people come in front of you who are  
9 people who have done things seriously wrong really for the  
10 first time in their lives after living a pretty good life and  
11 indicating that they're not bad people, but they made very  
12 serious misjudgments, very serious choices that were bad, as  
13 Mr. Zolkind indicated, and Mr. Nissen made a very bad choice.  
14 And my request of this Court is that that bad choice not color  
15 who Mr. Nissen really is.

16 Mr. Nissen, Judge, is, frankly, as the letters we've  
17 submitted to the Court, a very good man, who has indicated  
18 through his life a philanthropic, altruistic tendency in his  
19 life, and that's why when your Honor asked Mr. Zolkind whether  
20 he believed Mr. Nissen could commit crimes like this again in  
21 the future, I mean, I know sometimes -- and I have enormous  
22 respect for both prosecutors in this case; they've been fair,  
23 judicious, and they've worked with the defense and they should  
24 be commended for that, your Honor. But sometimes prosecutors,  
25 and I may have done this myself when I was one, act

J96Wniss

1 reflexively.

2           There's really no reason to think, statistically or  
3 otherwise, that Mr. Nissen will ever commit a crime like this  
4 again. We know statistically that white collar defendants,  
5 like Mr. Nissen, in his age group, his marital status, his lack  
6 of criminal record, I think the recidivism level is less than 4  
7 percent. So, if even from a statistical level it's unlikely he  
8 would do it, but certainly from his unique humanity and  
9 characteristics of who this person is, I think the chances of  
10 him doing this are remarkably lower than that. I wouldn't be  
11 disingenuous with the Court and ever rule anything out, because  
12 nobody can do that. But I think your Honor should be  
13 comfortable that from a specific-deterrence point of view,  
14 Mr. Nissen is going to be in front of this judge or any judge  
15 again. I think that's a good bet. Nothing's perfect, but I  
16 think it's a good bet.

17           Your Honor, the first criteria that a judge, under  
18 3553(a), should be considering is the nature and circumstances  
19 of the offense and the history and the characteristics of the  
20 defendant.

21           To me, your Honor, I don't think it's any accident  
22 that that is the singular, only criteria under 3553(a) that is  
23 in the conjunctive; that is, a Court's obligated to look at the  
24 nature and circumstances of the offense and the history and  
25 characteristics of the defendant. And that is because no

J96Wniss

1 judge, under the guidelines or under 3553(a), should be looking  
2 only at the crime and then at the defendant. They have to be  
3 looked at together. What instigated this? What were the  
4 motives? What type of person was involved in this offense?  
5 And that I believe, is why it's in the conjunctive.

6 Judge, you've probably had the Honorable Judge Rakoff  
7 thrown at you many times in sentencing memorandums, as he  
8 should be, because he's one of the most admirable judges on the  
9 bench, but I think the words that he used in one case are just  
10 worth repeating. He said:

11 "Surely, if ever a man is to receive credit for the  
12 good he has done, and his immediate misconduct assessed in the  
13 context of his overall life hitherto, it should be at the  
14 moment of his sentencing, when his very future hangs in the  
15 balance. This elementary principle of weighing the good with  
16 the bad, which is basic to all the great religions, moral  
17 philosophies and systems of justice was plainly what Congress  
18 had in mind when it directed courts to consider, as a necessary  
19 sentencing factor, 'the history and characteristics of the  
20 defendant.'"

21 It's such a beautifully stated purpose of what  
22 sentencing is, in deciding an appropriate sentence. And then  
23 the Supreme Court said it a year later when they said that in  
24 sentencing a defendant a court must consider the fact that it  
25 is a "unique study in the human failings that sometimes

J96Wniss

1 mitigate, sometimes magnify, the crime and the punishment to  
2 ensue."

3 To me, Judge, and you said it to Mr. Zolkind, the  
4 overarching principle of what is a fair and reasonable sentence  
5 in any criminal case is the parsimony clause, and that is what  
6 is the lowest sentence a court can impose that is sufficient,  
7 not greater than necessary, to meet the goals of sentencing?  
8 It's not the highest sentence, because for that it would be for  
9 life. It's what is the lowest sentence, because, frankly,  
10 Judge, and I'll talk about this a little bit later.

11 I was at a conference, and we had a fellow, who ended  
12 up on 60 Minutes, like, a month ago, who robbed a few banks  
13 when he was a young guy. Then he became a lawyer, remarkably.  
14 He clerked for a federal judge, and he became one of the great  
15 sentencing mavens we have; he goes around the country. And he  
16 was giving a bunch of lawyers and judges these statistics.

17 The United States of America represents 5 percent of  
18 the world's population. We represent 25 percent of the  
19 incarcerated population. There are 113 million Americans who  
20 either know or have a friend or relative who was or is in jail,  
21 and we have almost 3 million Americans presently incarcerated.

22 The bottom line, Judge, is we sentence people a lot  
23 more than any other country for longer periods of time than any  
24 other country, and our crime is no better. We punish a lot and  
25 we warehouse people a lot. We just do, and I'm not here to

J96WnissS

1 judge right or wrong, but these are just statistically the  
2 facts. And I'm going to get to this, Judge, but the question  
3 for your Honor is, under the goals of sentencing, what is the  
4 right sentence for punishment?

5 He knows he's going to jail, and frankly, he should be  
6 going to jail for a period of time for what he's done. The  
7 question is when does punishment -- the appropriate punishment,  
8 0top and when does warehousing begin? When are we just putting  
9 him away for a purpose other than appropriately punishing him  
10 for what he has done?

11 Your Honor, Mr. Nissen understands, and he's written  
12 to the Court, that his conduct was just monumentally wrong, and  
13 the victims who wrote to this Court -- it's easy for us to say  
14 how remorseful Mr. Nissen is, but he is. He had a reputation  
15 of trying to be honest and live a life of integrity in this  
16 business, and it's been shattered. He feels horrible for what  
17 he's done, and in order to rectify that, what he tried to do,  
18 and what he did do, is affirmatively go out, before there was  
19 an investigation -- and we can quibble about whether something  
20 was going to happen, not happen, but Judge, you've been a long  
21 time, and I have, 99 percent of the people wait for it to  
22 happen. They don't go in there and call the U.S. Attorney's  
23 Office up, as we did, when there was just a problem.

24 And Mr. Nissen, Judge, he could have fought this case.  
25 He could have filed motions. He could have had hearings. He

J96Wniss

1 could have put the victims on the stand. He could've done a  
2 lot of things, and maybe we could have made some mash-up. Who  
3 knows? But that was never the game plan. The game plan was "I  
4 screwed up here, this is bad, call the U.S. Attorney's Office,"  
5 and I immediately did it, at his direction, not my advice, at  
6 his direction. When we went in there, he proffered. He told  
7 them exactly what he did. He went through the records with  
8 them, met with the FBI, told them stuff about Mr. Rechnitz they  
9 weren't even aware of, about his relationship with Mr. Rechnitz  
10 that came out at the trial.

11 No 5K letter was written or entered into, no formal  
12 cooperation agreement, but there was clear cooperation in the  
13 case. He went and did that because it was the right thing to  
14 do, and then against the advice of the lawyer again, without  
15 going through communications, he calls up Mr. Taly to meet with  
16 him and tells him what he did with, frankly, the understanding  
17 that he was very likely going to get tape recorded here. And  
18 against the advice of counsel, he went out to do this because  
19 he felt he couldn't deal with it. He wanted to try and work it  
20 out. He wanted to see if Taly could take over the company,  
21 work something out with Falcon, to try and see if it could work  
22 out.

23 This is really who Nissen is. This was not something  
24 he was trying to hide. He went in, and he just bared his soul  
25 to the U.S. Attorney's Office, and, Judge, he met with the

J96Wniss

1 trustees. He met with the receivers. He made himself  
2 available to the government and to Kroll to try and figure out  
3 the losses and what the numbers were. This is a defendant,  
4 your Honor, who did everything right in order to try and put  
5 his money where his mouth is, to say not only am I remorseful,  
6 but I want to try to make it better if I can.

7 The reason this is so significant, Judge, there was  
8 another ticket guy who got indicted in this district and got  
9 sentenced by Judge Wood to 78 months in jail named Joseph Meli.  
10 Meli's case, your Honor, had a \$60 million fraud. Even though  
11 \$106 million of investor money was taken in, the government  
12 gave him credit -- I just was reading the sentence memo. The  
13 government gave him credit for interest payments, actually,  
14 that were made, which we did not get in this case. And I'm not  
15 saying we're entitled to it, but they did get it for Meli's  
16 case. Mr. Meli did nothing to help the government. He  
17 actually continued to obfuscate the crimes. Actually, he was  
18 someone, Judge, who did nothing right in connection with this  
19 investigation. And the reason that's significant is because  
20 his defense lawyer moved for a variance, and the government, in  
21 distinguishing cases in which the judges gave significant  
22 variances, said, Unlike those defendants he did nothing to help  
23 us. He didn't go to the SEC and try -- some of those other  
24 cases.

25 So, in other words, the government, your Honor, in



J96Wniss

1 fighting against Meli's motion for a variance, argued that he  
2 didn't help us, he didn't go forward. Contrary to the  
3 insinuations that Meli had given -- that's why it was fair  
4 comment, because otherwise, of course, you could never really  
5 hold it against a defendant that he didn't cooperate, but he'd  
6 insinuated that he was trying to do these right things. So, my  
7 argument, Judge, is where a defendant does all of these right  
8 things, it seems to me that, even in the government's  
9 perspective, certainly that they raised in the Meli case, a  
10 defendant should be entitled to, I believe, very significant  
11 credit for the remorse and the help and the cooperation he  
12 gave. And under *U.S. v. Fernandez*, even if it doesn't lead to  
13 a 5K agreement, as your Honor's aware, you have full authority  
14 and right to give Mr. Nissen credit for all the right things he  
15 tried to do after this happened.

16 Judge, I want to talk for two minutes about what NECO  
17 was to give you some understanding about the bad judgment that  
18 he did. And before I say that I know, I'm happy you  
19 understand, your Honor, that I don't think anyone thinks this  
20 is a predatory fraud. This was not something where Mr. Nissen  
21 went out and his primary or sole motivation was to reap  
22 enrichment for himself.

23 We know, from the *Rivernider* case, that that is a very  
24 significant point for a judge to consider. Judge Rakoff has  
25 and many, many -- Judge Crotty has, and many other judges have

J96Wniss

1 thought about the fact that, you know, Judge, if I run somebody  
2 over with my car by accident or run somebody over with my car  
3 because I'm drunk, either way I run somebody over, but the law  
4 always looks to why did I run somebody over? What were my  
5 motivations? And sometimes the defendant's conduct is  
6 different even though the result is the same.

7 \$71 million was lost by these victims, and we wish we  
8 could turn the clock back, because we know this caused harm to  
9 people. There's no getting around that, and we're not trying.  
10 But at the end of the day, the motivations behind what  
11 Mr. Nissen did were not the type of, as Mr. Zolkind indicated,  
12 Madoff-related greed, to screw everybody he could screw --  
13 excuse me language, your Honor -- in order to try and get that  
14 motivation. The ABA, your Honor, defines a predatory offense  
15 as intended to inflict loss with the sole or dominant purpose  
16 of generating personal gains for the defendant. That's clearly  
17 not what happened here.

18 Judge, regarding the \$71 million, Mr. Nissen started  
19 NECO in 2006. He was 34 years old, I think, back then. Over  
20 the time, your Honor, he put his entire life savings of about  
21 \$3 million into the company. He took no salary from 2012 to  
22 2015. He loaned the company his own salary. He tried to make  
23 this, and did make it, an enormously successful business.  
24 Indeed, your Honor, in 2016, after the loans were acquired, the  
25 company generated almost \$60 million in sales. This was, even

J96Wniss

1 at the time that Falcon came in, a really profitable, really  
2 revenue-generated company. One of the issues, this was all too  
3 granular in some ways, was EBITDA versus the actual profits,  
4 but there was terrific revenues that were being generated.

5 Mr. Nissen needed cash to operate. He had taken out  
6 these horrible, what would otherwise have been usurious loans,  
7 and he couldn't make the payments. And rather than going into  
8 bankruptcy -- Mr. Zolkind is right, and maybe he should have  
9 done that; not maybe, he should've done that. What he did is  
10 he went to Falcon and he borrowed money. 7 million of it was  
11 authorized for other payments, but I think it's important for  
12 the Court to know that out of the moneys he took from Falcon, a  
13 vast majority of it, in fact, did go for business expenses.

14 Payments clearly went to pay some other investors, but  
15 for example, your Honor -- this is in my sentencing memo -- 4  
16 million out of the money that he got from Falcon, in the  
17 closing, in July 2015, was immediately expended just on costs,  
18 out of the money got from Falcon. 7 million of the money went  
19 to a prior investor. 16 million went to overhead. 2 million  
20 was lost in the college football. A million was lost in a  
21 minus zero winter festival event. 5 million was lost on the  
22 Super Bowl. There were tremendous losses of capital that he  
23 got from Falcon. The amounts of money that actually went to  
24 pay other investors post-Falcon was probably -- I don't want to  
25 guess, but it's certainly less than \$10 million. \$11 million

J96Wniss

1 of the money went to Jona Rechnitz as a finder's fee for  
2 Rechnitz, as an expense for getting other people to bring in,  
3 to make investments into the company.

4 The point I'm making is not to justify his conduct,  
5 but I think it's important for your Honor to know that this was  
6 not the Ponzi scheme where everything from Falcon was shooting  
7 out to pay investors. It was going to generate and run the  
8 company primarily, but there was money that went out, and money  
9 was secured by Falcon through false statements. No one's  
10 trying to reduce the charges against that, but as far as the  
11 predatory nature of the offense, I think it's appropriately  
12 important for the Court to know that, as well as the  
13 government, what was going on.

14 You also should know, your Honor, Falcon was looking  
15 at the books and records of this company in a very, very  
16 significant way as well, so I think that that's important for  
17 the Court to know.

18 Judge, Mr. Nissen is 47 years old. He has no criminal  
19 convictions. He was born and raised in Brooklyn, New York.  
20 His parents were both school teachers. His two siblings --  
21 one's an attorney and one's a managing director as an insurance  
22 company. I'm not going to repeat this here openly in court,  
23 but as the memo indicates, let's say he has fairly complicated  
24 family relationships. His mom's not here today. His dad is in  
25 the hospital, diagnosed with cancer. He's been in the hospital

J96WnissS

1 since April. He has not been out. He has to learn to walk  
2 again, etc. Mr. Nissen has revived a bit of that relationship  
3 with his dad, who wanted to be here today but he could not. He  
4 has no relationship with one sibling and one relationship with  
5 the other.

6 Growing up, he's never had much of a safety net, and  
7 he doesn't have much of one now. He's thankful for what he  
8 does have from his family, from his parents and his siblings,  
9 but it's not much.

10 Since his arrest, your Honor, he has relied almost  
11 exclusively on his wife's love and kindness and on the kindness  
12 and generosity of friends. Mr. Nissen's not a lazy guy, Judge.  
13 When he couldn't work in this business anymore, he drove an  
14 Uber. When the Uber business fired him because of his arrest  
15 in this case, he has been spending the last year or so loading  
16 trucks at Hunts Point from 1:00 in the morning until 3:00 in  
17 the afternoon so that he could then come home and take care of  
18 his children while his wife was often at work during the day.  
19 That's what he's been doing, for minimum wage, because that's  
20 the kind of person he is. He has obligations financially to  
21 his family, and he has, since he's been a kid, been a hard,  
22 honest worker. That's who Jason is. He was never -- is not  
23 now and was not then -- a lazy thief looking for quick money.

24 When he was in high school, he had enormous athletic  
25 distinction, including academic ones, where he won math awards,

J96Wniss

1 science awards, all detailed in our memorandum. He has always  
2 been, since a kid, philanthropic. When he was an Eagle Scout,  
3 he literally was, proverbially and literally, the boy scout.  
4 He ran a food bank, essentially, for 700 senior citizens, where  
5 he managed that as an Eagle Scout. Letters from his college  
6 friends and football friends -- when the sentence was  
7 originally set, about a year ago, Judge, we had about 50 of his  
8 fraternity brothers and other friends, people who know him and  
9 who deal with him, talk about him, ready to come on to court.  
10 Many of them could not reschedule flights today, but they've  
11 all written letters and many of them still are here today.

12 Judge, I know you've read this -- I don't want to  
13 belabor the record, but I think indicative of the relationship  
14 that people think of him comes from his football coach in  
15 college, who wrote:

16 "Jason's most appealing characteristic was ability to  
17 strive to improve. He was always asking how can I get better.  
18 He would quickly raise -- quickly rise to be one of our team  
19 leader's. He gained the team's respect by what he did, on and  
20 off the field, and the intensity that he did it. He was always  
21 there to help a coach with the recruiting of a new prospect or  
22 to help his teammates with a math class. He was truly a person  
23 who valued his community and his teammates."

24 And he's continued to do that. He was active with  
25 underprivileged children and remained active with

J96Wniss

1 underprivileged children. He sponsored tournaments in  
2 basketball and softball, and still does. He tutored kids in  
3 math for free in underprivileged areas. After he graduated  
4 college, he didn't run away with his math degree and his math  
5 ring to get an MBA and work on Wall Street. Nothing wrong with  
6 that, but that's not what he did. He became a schoolteacher,  
7 where he again taught math. He then, Judge, tutored kids for  
8 free on their SATs, and one woman wrote a letter to the Court  
9 about the impact he had on that.

10 During NECO and since, your Honor, he's coached the  
11 boys' and girls' softball teams at Frank Sinatra School of  
12 Arts. He provides math tutoring to underprivileged kids at  
13 PS-292 in East New York. He volunteered for the NBA Junior  
14 Nets program, sponsored by the NBA, to help underprivileged  
15 kids. He's sponsored leagues and tournaments: In 2013, the  
16 Fab 48 Basketball tournament for youths; the New York Urban  
17 Professional League in Harlem; the Tip of the Hat Tournament in  
18 New York City in 2016, after this case had already become, come  
19 around; 2013 to '17, Chicago Mustangs basketball team to attend  
20 tournaments for, again, underprivileged kids.

21 Gary DeCesare, your Honor, who is a high school  
22 administrator in Chicago, who's known Jason for nine years,  
23 wrote a letter to the Court about how Jason has been in his  
24 community in Chicago to "mentor our young men" and continues  
25 "to help low-income students to attend private school." That's

J96Wniss

1 what Jason does. That is the kind of person he is.

2 There's letters, your Honor:

3 Christine Liu, a lawyer and former assistant chief  
4 counsel for the Department of Homeland Security, who wrote a  
5 letter to the Court about Jason's dedication to the Albertson  
6 Herricks Little League and how he's dedicated there -- his  
7 daughter plays there -- to help the team;

8 Deven Shah, who's a senior information risk officer at  
9 Bank of New York-Mellon, talks about Jason's kindness;

10 Norvin Lee, deputy assistant commissioner for DCAS,  
11 administration-police unit and the Albertson Herricks Little  
12 League, talks about his dedication to children;

13 Kevin Cloutier, who's known Jason forever, who is now  
14 a partner in a major law firm, talks about his kindness and he  
15 is the epitome, would give anything, take the shirt off his  
16 back for anybody;

17 Geoffrey Engler, an affordable housing developer  
18 working in Massachusetts, writes about the kindness that Jason  
19 has always extended; and on and on and on, Judge.

20 And perhaps somewhat moving is also an individual,  
21 your Honor, who is someone in his family who got very, very  
22 sick. Jason was there. Jason got doctors together. That's  
23 the guy he is. That's the guy he is, someone who, by and  
24 large, your Honor, on the scales of justice, this is the bad  
25 stuff and this is the good stuff. Just a fact, Judge.



J96WnissS

1           Now, your Honor, the saddest part of any criminal  
2           sentencing is the horrible impact it has on families. Whether  
3           it's Mr. Nissen or anybody else who appears in front of you, if  
4           there's families and children, they're impacted when dad or mom  
5           has to go to jail, and Mr. Nissen knows that and he lives with  
6           it daily and cries about it all the time, but he knows it's his  
7           fault and he has to now deal with those impacts.

8           The question for your Honor, I respectfully urge, even  
9           before the old days, *Booker*, when you had the extraordinary  
10          circumstances you had to show, even then, under that very high  
11          standard, the courts recognized the purpose of a sentencing  
12          court was never, ever to inadvertently, as a condition or part  
13          of the sentence, wreak havoc quote/unquote on the family unit.  
14          And that's unfortunately what's going to happen. Regardless of  
15          what your Honor does, there's going to be wreaking of some  
16          havoc, and sorry to say it to Mr. Nissen, but that's his fault.

17          The issue, though, is how much havoc has to be wreaked  
18          before the parsimony clause says it's enough? How much damage  
19          has to be done, which are going to be collateral consequences  
20          of his own behavior?

21          Haydee's here in court today. She's about eight  
22          months' pregnant. I think she's due in about 20 days. He's  
23          got a daughter with Haydee, Elisabeth. We've indicated to the  
24          Court in our sentencing memorandum some of the serious issues  
25          that she's going through at the age of three years old, about

J96WnissS

1 three, the cognitive issues, etc., without having to go through  
2 that in open court. Jason is one of the few remarkable guys  
3 who's actually still very close with his first wife, Deana, who  
4 wrote a letter to the Court about the type of terrific person  
5 Jason is and the outstanding dad he is to their daughter Ava,  
6 who is 11 years old. I was going to read her letter, but I  
7 don't think I could do it, frankly, without tearing up. This  
8 is the situation that Mr. Nissen finds himself in, trying to  
9 save his family, knowing that he has to get punished for what  
10 he's done, and that's one of the reasons, your Honor, that I  
11 opened up my remarks by saying that I wouldn't trade my job for  
12 yours for anything.

13 Judge, Dr. Silver -- we thought it was important to  
14 have a clinical perspective of this. He's indicated in his  
15 report what he thinks the impact of any sentence, but certainly  
16 a long sentence, would be. And Judge, we know that when  
17 children are removed from their parents, which unfortunately  
18 has happened in some political environments, that there is  
19 post-stress syndrome that evokes from that.

20 Jason is very, very close and very intertwined in the  
21 lives of his children. Whenever -- he's always with them when  
22 he's not working. Ava adores him. Ava and Elisabeth live  
23 close to each other. Haydee and Deana try to maintain a  
24 relationship with each other, and the concern is, once Jason's  
25 gone, how that's going to work its way out. Ava and Elisabeth

J96WnissS

1 not are only half-sisters, they're just like sisters to each  
2 other. And Elisabeth, they're just enormously concerned. And,  
3 Judge, you're a dad, I'm a dad. We all know the impact of the  
4 actions when we take -- when we have to leave for a short --  
5 parents who go to war, come back in a year, the impact on  
6 children. When you're talking about the types of numbers that  
7 the guidelines talk about here, it's just kind of  
8 mind-boggling.

9 So, Judge, talking about what's the right type of  
10 sentence to impose, the guideline numbers -- again, Judge  
11 Rakoff and many other judges have called them -- Judge Gleeson,  
12 etc. -- call them kind of the arithmetical madness that results  
13 from these numbers. You know what, Judge, what's weird, if you  
14 look at 1987 -- I put this in my memo. In 1987, Mr. Nissen's  
15 offense level would have called for a sentence of somewhere in  
16 the 30-month range for his conduct, the loss \$5 million and up.

17 Judge, what I did is I took the value of \$5 million  
18 and up and said what is \$5 million then worth today? \$5  
19 million then is worth about \$11-1/2 million in today's money.  
20 If you look at what the guidelines are for \$11-1/2 million,  
21 it's almost 70 months. So, just taking the base numbers and  
22 just extrapolating to our numbers, we have tripled the amount  
23 of jail time that what we thought was good in '87 to what we  
24 think is good now, for no empirical reason. None.

25 And Judge, you know it from all the memos you've read,

J96WnissS

1 there is no science behind it. It is purely, respectfully, as  
2 the literature shows, a reaction to address the public saying  
3 you've got to put more people in jail, for some reason, where  
4 Congress felt they had to react. There is really no science  
5 behind it; we just tripled the amount of time. And indeed, if  
6 you looked at the amount of gain that Mr. Nissen made from the  
7 offense and you weren't looking at the loss number, at an  
8 \$800,000 gain, you're probably looking at somewhere in the  
9 three-year range as well.

10 At the end of the day, Judge, for some reason our  
11 guidelines now are talking about warehousing a 47-year-old man  
12 essentially until he's 57 or 55 for a very serious crime,  
13 admittedly, but ignoring, respectfully, all of these other very  
14 serious factors. And I can see why so many judges in this  
15 district -- and this district is the most creative district in  
16 the country for imposing sentences below the guidelines range,  
17 because, frankly, I think judges, many of them, and I don't  
18 mean to impute some, respectfully, I think that there's an  
19 understanding that human life means something and that  
20 punishment means something, but a guy like Jason Nissen can be  
21 doing a lot more out sooner than in longer. And a guy like  
22 Jason Nissen and Elisabeth and Ava and his wife, there's a  
23 serious amount of pain they have to suffer, but again, Judge,  
24 not to be redundant, how much is enough?

25 That is, your Honor, for you to determine.

J96Wniss

1           Finally, Judge, as far as disparity issues are  
2 concerned in sentencing, we've given the Court a whole bunch of  
3 cases, and I know you know those cases and you've read those  
4 cases, where defendants have committed crimes, some less  
5 serious, some much more serious, where courts have given very,  
6 very, very significant variances to defendants based upon their  
7 view of the arithmetic craziness of the numbers and a whole lot  
8 of other reasons.

9           Your Honor, I understand that one of the purposes of  
10 sentencing is to send a message. It's an important thing to  
11 do, general deterrence we lawyers call it. You've got to send  
12 the message out to society you can't do this stuff without  
13 suffering for it. Statistically and empirically, and it's all  
14 in the memo, we all know that short and definite sentences have  
15 a greater impact, actually, than long sentences down the road  
16 on white collar defendants. They just do. There's no need,  
17 Judge -- a white collar offender is not going to say, Let me  
18 see, if I get three years that's a good one; if I get nine  
19 years that's a bad one. White collar offenders -- and many  
20 other offenders may think that. Anyway, Judge, the analysis is  
21 on white collar offenders. They know that even sentences of  
22 probation have drastic, drastic deterrent impacts of  
23 defendants, and I'm not suggesting that that's what's happening  
24 here, but they all know that.

25           Judge, it all comes back to the parsimony clause

J96Wniss

1 again. Your Honor, we defer to your judgment, your experience  
2 and your view of all these facts to come up with a fair number  
3 and a reasonable number that is the lowest number that meets  
4 the goals of sentencing, taking into consideration his  
5 cooperation, his clean record, his charitable events, which in  
6 and of themselves deserve a variance. And all of those other  
7 factors and, most remarkably, the family unit that we argue  
8 deserves serious, serious consideration by your Honor.

9 Thank you so much, your Honor.

10 THE COURT: Thank you, Mr. Bachner.

11 Mr. Nissen, do you wish to make a statement?

12 THE DEFENDANT: Yes, your Honor.

13 THE COURT: Just kindly speak into the microphone.

14 THE DEFENDANT: Yes, your Honor.

15 THE COURT: Thank you.

16 THE DEFENDANT: I have mixed emotions as I stand  
17 before this Court. On the one hand, I am very scared. Growing  
18 up and leading the life that I have had, I never thought I  
19 would do something so very wrong and facing a sentence before a  
20 judge.

21 But I have also been looking forward to today because  
22 I have wanted for a long time, since I was arrested, to tell  
23 certain people how sorry I am for my actions, how sad I am  
24 because of what I have done to good people, and how remorseful  
25 I am for my actions.

J96Wniss

1           Somehow I lost my way in trying to keep my company  
2       afloat. NECO to me was like a child I reared and nurtured. I  
3       was so excited about building the business and being a success.  
4       It was a real business, a growing business. In my mind I felt  
5       like I could not abandon it when we suffered certain losses. I  
6       always believed things would work out and no harm would be done  
7       to anyone. I never intended for anyone to lose any money.

8           But my conduct was wrong. There is no real excuse for  
9       what I did. I just want people to understand what I was  
10      thinking.

11          My illegal conduct is something I will live with for  
12      the rest of my life. I have already apologized to Falcon and  
13      to other victims of my conduct, and to those I have not  
14      apologized to personally, I do so now. I quickly pled guilty.  
15      I self-reported my crime. I have given my full cooperation to  
16      help recover any funds that could and should be recovered. I  
17      express my sincere remorse to Falcon, Hutton, Taly, EGC and  
18      TickPick for their losses and hardships I have caused, and I  
19      promise to work hard to make restitution to all of you.

20          As I rehabilitate myself, I hope to become an  
21      upstanding member of my community and society and that I will  
22      also earn your forgiveness.

23          I also want to apologize to my family and friends. It  
24      is often the loved ones of the people who commit a crime that  
25      pay the highest price, and it is no different in my case. My

J96Wniss

1 wife, who is eight months' pregnant, and my two young children,  
2 Ava and Elisabeth, have suffered and will suffer more than I  
3 can describe because of what I did. Mr. Bachner has discussed  
4 in our report the serious family issues I have and the horrible  
5 impact my sentencing will have on Haydee and our kids. I know  
6 this is all of my fault, but still I must beg of your Honor to  
7 please consider and show me some mercy, for their sakes only.

8 Not only have I caused pain to the victims of my crime  
9 and to my wife and children, but I have hurt my parents, who  
10 raised me to know right from wrong. I feel tremendous shame.

11 I don't know what the future has in store for me, but  
12 the one thing I can say with certainty is that I will never do  
13 anything like this again. Before my conduct in this case, I  
14 lived an honorable life. I am basically a good person, but I  
15 did wrong and understand I will be punished. I ask this Court  
16 for mercy on behalf of my family, not for me.

17 I thank the Court for the time it has given me to  
18 speak today.

19 THE COURT: Thank you, Mr. Bachner.

20 Counsel, we're going to take a five-minute recess for  
21 everyone's comfort and while I collect my thoughts.

22 (Recess)

23 THE COURT: Be seated, everyone.

24 Is there any reason why sentence should not now be  
25 imposed?



J96Wniss

MR. ZOLKIND: No, your Honor.

MR. BACHNER: No, your Honor.

THE COURT: Let me begin, before I set out my sentencing remarks, just by thanking all counsel both for your really helpful written submissions in advance of sentencing but also your very thoughtful and helpful oral submissions today. And I particularly want to thank counsel for spending a great deal of time with the process of reconstructing the money trail here, which turned out to be important but obviously imposed a burden on counsel beyond that which occurs in the usual case. It was of considerable assistance to me in helping me figure out the just outcome here, so I'm grateful to all here.

As I have stated, the guideline range applicable to this case is 97 to 121 months' imprisonment.

Under the Supreme Court's decision in *Booker*, and the cases that have followed it, the guidelines range is only one factor that the Court must consider in deciding the appropriate sentence. The Court is also required to consider the other factors set forth in 18 U.S.C. 3553(a). These include:

The nature and circumstances of the offense and the history and characteristics of the defendant;

The need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law; and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from

J96Wniss

further crimes of the defendant; and to provide the defendant with needed education or vocational training, medical care or other correctional treatment in the most effective manner;

The kinds of sentences available;

The guidelines range;

Any pertinent policy statement;

The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

The need to provide restitution to any victims of the offense.

The Court is also required to impose a sentence sufficient but no greater than necessary to comply with the purposes set out above.

I find that the sentence I am about to pronounce is sufficient but not greater than necessary to satisfy the purposes of sentencing I have just mentioned.

Mr. Nissen, imposing sentence is always difficult. But I have found your case to be a particularly difficult and tragic one. I reflected on your case in the lead-up to the initial sentencing hearing last year. It has been on my mind in the nearly one year in between then and now while Kroll did its work. And in the past several weeks, as this day has approached, I have given a great deal of thought and attention to the appropriate sentence in this case, in general and

J96Wniss

specifically in light of the Section 3553(a) factors that guide a court in sentencing, and the appropriate purposes of sentencing.

It is safe to say there are factors that point strongly towards quite a long sentence, and there are factors that point strongly in the other direction. I have carefully reviewed the parties' submissions, the two victim impact statements I have received, and the letters I received on your behalf from your family and friends, the people who know you best. The following are my thoughts.

Forgive me at the outset for going on at some length, but this is a complex case, and explaining the sentence I have determined to be just and reasonable takes some time.

Under Section 3553(a), one set of factors a court must consider is the seriousness of the offense and the need for just punishment and the need for the sentence to promote respect for the law. Of the various 3553(a) factors, these factors are the ones that point most strongly towards a long sentence.

To put it simply, as Mr. Zolkind said, you perpetrated a fraud on a massive scale. The fraud cost your lenders more than \$71 million. And make no mistake, the crime here did not consist of a failure to repay a loan. That, without more, would not have been a crime. The crime here involved obtaining those loans on false pretenses. That's what made it a fraud.

J96Wniss

1 There were various false pretenses, but your core false  
2 pretense in your representations to potential lenders was that  
3 the money you were obtaining would almost all be put towards  
4 future business; that is, the purchase of ticket inventory and  
5 the like. That was false. In fact, as you well knew, the  
6 money was going to be used to repay old debtors to a degree far  
7 greater than you disclosed. You knew the loan proceeds would  
8 be used in this fashion, but to get the loans you falsely  
9 pretended otherwise. And that's, in fact, what happened.  
10 Money that lenders thought was going to be applied towards  
11 future business was used to pay back old debts that you were  
12 otherwise unable to repay. In effect, although your underlying  
13 ticket business was legitimate, your conduct as it related to  
14 financing that business became a Ponzi scheme in which new  
15 money, styled as investments, went to pay back old debts.

16 And along the way, to keep the fraud going and to  
17 avoid discovery, you made collateral lies to dupe your lenders.  
18 You forged documents. You changed the balance on a bank  
19 statement via Photoshop. You fabricated accounts receivable  
20 numbers of the ticket company that were being reported to  
21 lenders. You transferred funds among accounts to give the  
22 illusion of financial solvency. In all these ways, you  
23 camouflaged the true state of the company's finances and you  
24 perpetrated the fraud. This took time and effort and  
25 forethought. The fact that your crime continued over time and

J96Wniss

1 was not a one-time event and necessarily involved a series of  
2 deliberate actions to con your lenders and avoid detection  
3 makes it more serious.

4           The crime is also serious because of the consequences.  
5 The effect of the crime was to rip off a number of lenders --  
6 Falcon Strategic Partners, Taly USA Holdings and an affiliate,  
7 Hutton Ventures, TickPick LLC and Dean Landis and related  
8 entities. The fact that the victim companies are corporate  
9 entities does not mitigate the crime. Corporate victims have  
10 rights too. And as the victim impact letters I have received  
11 reflect, and Mr. Zolkind made the point well, behind those  
12 corporate entities are real people with real lives whom your  
13 scheme badly harmed. The letter from the representative of one  
14 victim described the damage that you did by looting that  
15 company. The letter stated that your crime ate up the savings  
16 of innocent individuals who had stakes in that company and  
17 depended on its solvency. Your crime, that victim stated,  
18 devastated people who were counting on their company to provide  
19 for their retirements and for their children's educations. In  
20 other words, the damage you did here was anything but abstract.  
21 Real people were hurt, indirectly but predictably, by the \$71  
22 million fraud you directed to the lending companies.

23           You and Mr. Bachner, to your credit, have not blamed  
24 the victims here, but I nevertheless want to be very clear. To  
25 the extent there could be any suggestion that these companies

J96Wniss

1 assumed the risk your criminal conduct presented, I reject that  
2 claim completely. The victim companies were in the lending  
3 business, and they assumed the risk of losing all their money.  
4 Any company that lends money to a company in the  
5 ticket-reselling business is taking a large risk that they will  
6 not get their money back. Lending to a ticket-reselling  
7 company is playing with fire. It's not like lending money to  
8 General Electric or IBM. And the high interest rates that your  
9 company was obligated to pay the lenders make clear that the  
10 lenders perceived a big risk. But your lenders had rights too,  
11 and chief among them was to be told the truth. They did not  
12 take the risk of getting defrauded by their debtor. They had  
13 the right to rely, before parting with their money, on the  
14 truthfulness of your representations as to where the money was  
15 headed.

16 And their rights were not only at the outset of the  
17 lending relationship. During the time period that the loans  
18 remained outstanding, your lenders had the right to rely on  
19 your representations as to where the loaned money had gone and  
20 what the ticket company's financial condition then and there  
21 was. Had the lenders who had fronted your company money known  
22 earlier in time that your company was in desperate straits and  
23 overextended and effectively on life support, they could have  
24 acted then to protect their interests. But your lies to them,  
25 over time, lulled them into inaction. Your lies deprived them

J96WnissS

1 of the ability to act to protect their interests until it was  
2 too late.

3 Mr. Nissen, I appreciate that you, through your  
4 counsel, have criticized one of the lenders for accusing you in  
5 its letter of absconding with \$10 million of the proceeds for  
6 later use on a Caribbean island, or something of that nature.  
7 I am persuaded that that was an inaccurate accusation.  
8 Ultimately, its falsity was exposed by Kroll's work, but the  
9 bottom line is that Taly and Falcon and the three other lenders  
10 whose money you diverted to pay your preexisting debts are  
11 victims here. I completely understand the victims' outrage at  
12 being looted of millions of dollars. I can understand how a  
13 victim of a fraud of this scale might jump to the conclusion  
14 that the perpetrator of a fraud of this scale had stashed money  
15 away somewhere. It just so happens, though, as Kroll has  
16 shown, that that isn't the case.

17 The bottom line is this. Under Section 3553(a), the  
18 \$71 million fraud here, perpetrated by a long-running series of  
19 lies, makes this crime extremely serious. Section 3553(a)  
20 requires a sentence to reflect just punishment, and the  
21 gravity, duration and means and methods of the crime together  
22 mean that there is simply some level below which a sentence  
23 simply cannot go lest it not reflect just punishment.

24 And so, victims of the crime here, to the extent you  
25 are here, and I think that's just one, but victims as well who

J96WnissS

1 will read this transcript later, please know that the sentence  
2 I impose today will respect and reflect the wrong that was done  
3 to you, and I will put in place a restitution order reflecting  
4 the debt that Mr. Nissen owes each of you from the scheme. I  
5 will make it a condition of the maximum term of supervised  
6 release that will follow Mr. Nissen's incarceration that he  
7 make payments towards that restitution order. And more than  
8 that, I expect that to the extent restitution is unpaid at the  
9 end of the supervised release term, the restitution order, by  
10 my hand, will be converted to a civil judgment against  
11 Mr. Nissen. The victims can then use that order to assure  
12 Mr. Nissen's continued payment towards restitution in the many  
13 years and, if necessary, decades, to come.

14 Before leaving this first set of Section 3553(a)  
15 factors, I do want to comment on the motive for this crime,  
16 because that is important context.

17 As a judge in this court, I see many cases involving  
18 financial fraud. The vast majority of defendants sentenced for  
19 such crimes were motivated by personal greed. I'm referring to  
20 cases involving insider trading schemes, boiler room schemes,  
21 telemarketing schemes, corporate schemes to phony up earnings  
22 reports and other financial metrics and any number of other  
23 schemes and scams prosecuted as mail fraud, wire fraud, bank  
24 fraud or securities fraud. The goal of these frauds is almost  
25 always personal enrichment, and the fruits of those frauds are



J96Wniss

1 often opulent real estate and swollen bank accounts and  
2 driveways full of luxury cars and extravagant resort travel and  
3 shopping sprees and the like. I have seen many of those cases,  
4 years ago, as a prosecutor and, in more recent years, as a  
5 judge.

6 This is not such a case, or even remotely close.

7 You have written in your letter to me, and you have  
8 consistently said, Mr. Nissen, that your goal in seeking the  
9 loans here by illegal means was to keep your company alive.  
10 The record, as developed by Kroll, under the supervision of  
11 government counsel over the last year, makes clear that that is  
12 so.

13 Of course, your desire to keep NECO alive did not  
14 justify breaking the law and lying to lenders. The responsible  
15 course for you was instead to tell the truth to the lenders.  
16 Your responsibility was to accurately portray the company's  
17 finances and to let the chips fall where they might; if your  
18 company went bust, if a lender forced you into bankruptcy, with  
19 all the hard consequences that meant for you and your employees  
20 and all the shame you might have felt, so be it. You had no  
21 right to dupe lenders because you weren't willing to face up to  
22 the company's inability to pay its debts. You had no right to  
23 take liberties like that with other people's money or to put  
24 your company's survival over the rights of your lenders.

25 But the fact that your motivation was to save the

J96Wniss

1 company and not to line your pockets is important in my  
2 assessment of the just punishment. The crime would be much  
3 worse and much more predatory and despicable had it been  
4 committed out of personal greed. I am persuaded that this  
5 crime had its roots in your unwillingness to face reality. You  
6 were unable to acknowledge that your company, after a series of  
7 financial reversals, could not pay its debts and was on the  
8 brink of collapse. In the crucible, you panicked and you made  
9 a terrible decision, one with whose consequences you will live  
10 for the rest of your life. Instead of owning the problem and  
11 taking responsibility, you shifted responsibility to your  
12 creditors, whom you misled. And while that kept the company  
13 going somewhat longer, it only deepened the hole you were in  
14 and it only deferred the reckoning. That's why we're here  
15 today.

16 I asked that the Kroll investigation be done because  
17 it was important for me to determine empirically what your  
18 motivation had been, and the Kroll investigation almost  
19 entirely bears out your version of events. It shows that  
20 almost all of the money obtained from lenders was used to keep  
21 your company afloat by paying its debts.

22 Now, the record is not perfect in this respect. A  
23 subset of the funds obtained by NECO were used to pay personal  
24 expenses of yours. These included money paid towards the  
25 purchase of your home and alimony to your ex-wife and payment

J96Wniss

1 of Haydee Nissen's credit card expenses and gambling losses.  
2 And so it isn't literally the case that there was no direct  
3 personal benefit whatsoever. There was some, and that is an  
4 unfortunate fact for you. That fact is today's sentence.

5 But the big picture revealed by Kroll's work is that  
6 this crime was fundamentally a misbegotten effort to save the  
7 company, and as Mr. Bachner points out, had you been driven by  
8 personal enrichment as opposed to trying to keep the company  
9 alive, you would have taken for yourself, and not kept in the  
10 company, the hundreds of thousands of dollars in uncashed  
11 distribution checks to which you were entitled.

12 Bottom line, while your crime inflicted great harm,  
13 your motive was far more situational than in most cases of  
14 comparable sized fraud. Most cases generating guidelines like  
15 yours involve perpetrators whose motives are more malignant.

16 That ends my discussion of the first set of 3553(a)  
17 factors, meaning the need for just punishment and the like.

18 Under Section 3553(a), I am to consider next the  
19 interest in what is called general deterrence. That refers to  
20 the need for the sentence I impose to be sufficient to  
21 discourage other people who would consider committing a  
22 financial fraud like yours from doing so. There is a very  
23 strong interest in that here. There are far too many cases  
24 involving business fraud in our criminal justice system. It's  
25 important that the sentences imposed in these cases, considered

J96Wniss

1 in the aggregate, be sufficient to convey to people who  
2 consider crossing such a line that, if they get caught, there  
3 will be life-changing consequences.

4 As the government points out, the interest in a  
5 sentence that will serve as a general deterrent is particularly  
6 acute in the area of white collar crime. That is so for a  
7 number of reasons. There tend to be fewer prosecutions in that  
8 area; the cases of guilt beyond a reasonable doubt can be  
9 harder to build in that area; the prosecutions and sentences in  
10 cases in that area tend to get outsized attention; and people  
11 in white collar lines of work tend to hear about sentences  
12 imposed on white collar perpetrators, like you, of financial  
13 frauds. So, the premise of general deterrence has special  
14 traction in the area of business crimes like yours.

15 At the same time, while the interest in general  
16 deterrence favors a meaningful prison sentence, it does not  
17 guide a court more specifically than that. There has been a  
18 lot of scholarship in the area of general deterrence. It  
19 pretty universally shows that when it comes to deterring other  
20 people from committing crimes, it is primarily the speed and  
21 likelihood of getting caught and convicted that is the most  
22 powerful general deterrent. Provided that there is some  
23 meaningful sentence, the scholarship does not suggest that the  
24 length of the sentence contributes much at all to general  
25 deterrence. Beyond a certain point, an incrementally longer

J96Wniss

1 sentence does not yield incrementally greater general  
2 deterrence of other people, so the factor of general deterrence  
3 favors a meaningful prison sentence, but not one of any  
4 particular length. It certainly doesn't require anything  
5 remotely close to a sentence within the guideline range here.

6 Under Section 3553(a), I am also to consider the  
7 interest in specific deterrence. That refers to the need for  
8 the sentence I impose to send a message that is sufficient to  
9 deter you from committing a future crime, Mr. Nissen. That  
10 factor, in my judgment, is not insignificant in your case.  
11 This was your first offense. You have had a completely  
12 spotless criminal record. In fact, outside of this offense,  
13 you appear to have led a thoroughly upstanding life, with a  
14 strong record of gainful employment, industry and civil  
15 engagement, and this offense was self-evidently the product of  
16 particular circumstances. Your company was up against it, and  
17 you made a terrible choice. You succumbed to the temptation to  
18 try to patch your company through by seeking out loans on false  
19 pretenses.

20 But there is nothing in your history or the record of  
21 this case that would lead a person to think that you will  
22 recidivate. There is nothing that suggests that you are prone  
23 generally to taking advantage of others. Everything I have  
24 read about you is to the contrary.

25 It's also clear to me that you are in agony as a

J96Wniss

1 result of being disgraced, of being prosecuted, of facing a  
2 term in federal prison, and of subjecting your wife and the  
3 children, who you adore, to financial hardship and separation  
4 from you. I have no doubt, none whatsoever, that if you are  
5 ever tempted to commit a crime again, the searing pain of the  
6 past several years would stay your hand, and so, insofar as the  
7 3553(a) factor of specific deterrence is concerned, a long  
8 prison sentence is not needed here. Coupled with all the other  
9 adverse effects upon you of the exposure of your fraud, a  
10 prison sentence of almost any length should get your attention  
11 and deter you from committing another crime.

12 In this respect as well, Mr. Nissen, your situation is  
13 different from many fraud defendants with guidelines ranges  
14 like yours. In many of those cases, the defendant's conduct  
15 and history is one good reason to fear that he may strike  
16 again.

17 Under Section 3553(a), I also have to consider the  
18 interest in protecting the public, otherwise known as  
19 incapacitation. That refers to the benefit that the public  
20 gets when a person who is prone to commit further crimes is put  
21 in federal prison, where, by definition, they cannot injure the  
22 free public. For much the same reasons as I covered just now  
23 in discussing specific deterrence, that is also not a  
24 consequential factor here. I do not believe you are a risk to  
25 the public.

J96Wniss

1           The public has little to fear from you, Mr. Nissen, if  
2           you are at large. Until this crime, you were very much a  
3           positive contributor to your various communities. Unlike many  
4           of the violent criminals or drug dealers or serial thieves or  
5           fraud perpetrators whom I have occasion all too much occasion  
6           to sentence, you do not have any demonstrated proclivity to  
7           commit crimes. There are other reasons a meaningful prison  
8           sentence is required here, primarily just punishment and to  
9           some degree general deterrence. The protection of the public  
10          is not one of them. In this respect as well, your case is  
11          quite different from the heartland of cases to which the fraud  
12          guidelines apply.

13          So far I have reviewed the factors under Section  
14          3553(a) that, in many cases, tend favor a longer period of  
15          incarceration, although in your case, only some of them do. I  
16          now want to turn to two other 3553(a) factors, two other  
17          factors that favor you. To begin with, you accepted  
18          responsibility. You did that, first and foremost, by pleading  
19          guilty. In so doing, you acknowledged that you had done wrong,  
20          and you spared the Justice Department and the federal courts  
21          the resources that otherwise would have been consumed in  
22          litigating your guilt. That matters to the Court, as it does  
23          under the sentencing guidelines. Please know that had you not  
24          pled guilty, had your guilt been established instead at a trial  
25          that had facts that were substantially the same, the sentence

J96Wniss

1 you would have received would have been a good deal higher.

2 In your case, there is added significance to your  
3 acceptance of responsibility because of the exceptional  
4 circumstances surrounding it and the exceptional nature of the  
5 steps you took. Ordinarily, a defendant who gets credit for  
6 accepting responsibility is indicted, and then sometime later,  
7 after receiving discovery and while on a pretrial schedule,  
8 agrees to plead guilty and admits guilt. In your case, in  
9 contrast, you confessed to your victims and you walked the case  
10 into the U.S. Attorney's Office. You admitted your guilt, and  
11 from there it was just a matter of negotiating the details of  
12 the plea.

13 Now, I understand that credit for that wise decision  
14 is due, in part, to your counsel, and I also understand that  
15 the circumstances left you with limited viable options.  
16 Circumstances, as the government rightly points out, had  
17 spiraled well out of your control. You were unable to pay your  
18 creditors. You had been confronted by them. You had confessed  
19 to some of them, and it was clear to all that you had brazenly  
20 lied to them to get their money. It was a matter of time  
21 before your creditors would have reported the fraud presumably  
22 to the Justice Department, and it was a matter of time before  
23 you were charged and apprehended.

24 Nevertheless, with the benefit of eight years on the  
25 bench, I can say that your decision to self-report your fraud



J96Wniss

1 was extraordinary. I've seen many defendants who, by any  
2 objective measure, are dead to rights. The evidence of their  
3 guilt is increasingly overwhelming. They, however, do not  
4 self-report, and they often enter pleas of guilty long after  
5 indictment. You deserve more credit for owning your guilt and  
6 admitting it early and unequivocally. Again, you saved the  
7 system substantial resources that could presumptively put to  
8 use in other matters. In the same vein, you have worked with  
9 your lenders and the bankruptcy trustee to reconstruct events.  
10 All of that may help your victims gain a degree of relief.  
11 Certainly it has helped counsel and the Court formulate  
12 restitution and forfeiture orders, whose terms you properly do  
13 not dispute.

14 I also accept that you are remorseful for your crimes.  
15 I've read your lengthy letter to me. I've heard your remarks  
16 today. It's clear to me that you appreciate the steep price  
17 that your family is paying and will continue to pay for your  
18 decision to defraud your lenders. I appreciate that you've  
19 expressed remorse for the harm you visited upon your lenders,  
20 who did not deserve what they got.

21 Apart from your acceptance of responsibility, as Mr.  
22 Bachner points out, I am required, under Section 3553(a), a  
23 court to consider the defendant's history and characteristics,  
24 and at this point in the analysis, I am focused on the aspects  
25 of your life and character independent of the crime for which

J96Wniss

1 you are about to be sentenced. In assessing that, I have been  
2 benefitted by an excellent and perceptive presentence report  
3 but also by the very insightful sentencing submission I  
4 received from Mr. Bachner and from the many letters attached to  
5 it.

6 From the many letters I have received about you, it is  
7 clear to me that this offense, while gravely wrong, is also  
8 completely anomalous in your life's experience. You present  
9 from those letters as a person with a profound work ethic,  
10 going back to your teens; as a devoted son and brother and  
11 father and husband; as a girls' softball coach who has taken an  
12 outsized interest in the well-being of the children on his team  
13 and their families; and as an employer with a laudable degree  
14 of commitment to his employees, albeit that may have led you to  
15 stray here.

16 It is also clear to me that as a result of the central  
17 role you play in the lives of many people, including your wife  
18 and daughters and even your ex-wife, your absence will hit  
19 others hard. It's also clear to me, as we heard this morning,  
20 that certain people in your extended family who are positioned  
21 to step up to fill the void that you will leave upon your  
22 incarceration, particularly in the life of your younger  
23 daughter, have not done so. That saddens me. In the interest  
24 of your daughter, who has done nothing wrong and should not be  
25 shunned on account of her father's misdeeds, I certainly hope

J96Wniss

1 that her relatives and others will rally around her.

2 I've read carefully all the letters I received on your  
3 behalf, as I did the victim impact letters. I was going to  
4 read aloud extensive excerpts from the letters. I'm not going  
5 to do that, because Mr. Bachner has essentially all but done  
6 that for me, and while there is more that I could capture in  
7 the letters, I think his summary substantially captured the  
8 central ingredients.

9 Let me just ask, by a show of hands, who here wrote  
10 letters to me.

11 All right. Please know that I read in detail all of  
12 those letters, and I appreciate those of you who participated  
13 in this proceeding by writing about Mr. Nissen. Your insights  
14 and your accounts of his good works absolutely made a  
15 difference in my assessment of his history and characteristics,  
16 and I thank you for participating as you did.

17 These letters are all impressive testimonials. On the  
18 day that a person is sentenced, it is appropriate that they be  
19 evaluated in light of the totality of their life's experience,  
20 the good as well as the bad. I will do so today, Mr. Nissen.  
21 Please know the letters I have received about you from your  
22 family and your many friends have assisted me in my reflections  
23 as to the just sentence.

24 In the end, my judgment here is that while a real and  
25 meaningful term of imprisonment is necessary as a matter of

J96Wniss

1 necessary and just punishment, the guidelines recommendation of  
2 a term of between 97 and 121 months' imprisonment is not only  
3 excessive but obviously excessive. The Court's obligation  
4 under the law is not to be a slave to the guidelines, and the  
5 judges in this district recognize that. In over half the cases  
6 in this district, courts vary below the guidelines range, often  
7 markedly, and under the parsimony principle repeatedly  
8 articulated by the Second Circuit, it is not merely to impose  
9 some reasonable sentence; it is to impose the lowest reasonable  
10 sentence viewed in light of the 3353(a) factors.

11 Here, while an eight- to ten-year sentence could  
12 certainly be viewed in some sense as among the reasonable  
13 sentencing options, the 3553(a) factors make sentences  
14 materially below that guideline range eminently reasonable too,  
15 and again, under the parsimony principle, the lower of the  
16 reasonable sentences as a matter of law is to control.

17 The guideline range here is driven almost entirely by  
18 the dollar amount of the fraud, but the guidelines do not take  
19 into account the factors that distinguish your case from  
20 others' with similar ranges. Most of all, as I've said a  
21 couple times, those cases, the defendant presents almost always  
22 a real risk of recidivism, such that the factors of protection  
23 of the public and specific deterrence require a prison term of  
24 greater length.

25 Not so here. For the reasons I have stated, in your

J96WnissS

1 case, the risk of recidivism is not a serious concern. Your  
2 life's experience involves an admirable amount of good works,  
3 and I do not perceive any risk to the public presented by your  
4 being at liberty. On the contrary, it is clear to the Court  
5 that once you have served your time for this crime, society  
6 will be better off with you in it as a free man, doing good and  
7 helping pay down the judgments against you. Your life's  
8 experience tells me that a free society is better off with you  
9 in it than behind bars.

10 I will, accordingly, impose a prison sentence that  
11 reflects a substantial downward variance to the guideline  
12 range. To the extent, however, that the defense at any point  
13 might have envisioned a noncustodial sentence or a sentence so  
14 short as to permit Mr. Nissen to be released in time for  
15 certain milestones within his family, I regret that any such  
16 request is also unrealistic, and Mr. Bachner, of course, today  
17 acknowledged the need for a prison sentence. This was a vast  
18 fraud, and as a matter of just punishment, as I said at the  
19 outset, and I will conclude with this, there are limits below  
20 which a court cannot responsibly go lest to trivialize the  
21 offense.

22 Mr. Nissen, since the time your loan scheme ran  
23 aground, you have done all a person can do to accept  
24 responsibility and to begin to make amends, but as a matter of  
25 justice, as a matter of just punishment that fits the crime,

J96Wniss

1 there is a price you must pay, with your liberty, for that  
2 offense. The variance from the guidelines here will,  
3 therefore, still result in a consequential term of imprisonment  
4 that I'm convinced no one would rationally choose.

5 I have given long and hard thought to the sentence  
6 here. Here, I hope it's obvious that the sentence I'm about to  
7 impose is the lowest one, after considered thought, that I  
8 believe to be responsibly and reasonably imposed consistent  
9 with the Section 3553(a) factors, including the sentencing  
10 guidelines.

11 I'm now going to formally state the sentence I intend  
12 to impose. The attorneys will have a final opportunity to make  
13 legal objections before the sentence is finally imposed.

14 Mr. Nissen, would you please rise.

15 After assessing the particular facts of this case and  
16 the factors under Section 3553(a), including the sentencing  
17 guidelines, it is the judgment of the Court that you are to  
18 serve a sentence of 27 months' imprisonment in the custody of  
19 the Bureau of Prisons to be followed by a period of three years  
20 of supervised release.

21 As to the supervised release, the standard conditions  
22 of supervised release shall apply.

23 In addition, you will be subject to the following  
24 mandatory conditions:

25 You shall not commit another federal, state or local

J96Wniss

1 crime.

2 You shall not illegally possess a controlled  
3 substance.

4 You shall not possess a firearm or destructive device.

5 You must cooperate in the collection of DNA as  
6 directed by the probation officer.

7 You must notify the Court of any material change in  
8 your economic circumstances that might affect your ability to  
9 pay restitution, forfeiture or special assessments.

10 You must also meet the special conditions that are set  
11 out on page 32 of the presentence report.

12 You must provide the probation officer with access to  
13 any requested financial information. You must not incur new  
14 credit charges or open additional lines of credit without the  
15 approval of the probation officer unless you are in compliance  
16 with the installment payment schedule that will be set in  
17 connection with restitution.

18 I'm also going to make the payment of restitution, of  
19 course, a condition of supervised release.

20 As to restitution, I find that the victims have  
21 suffered monetary losses compensable under the victim  
22 protection act in the amount set out in the order of  
23 restitution that the government has provided, to wit,  
24 \$71,678,669.90.

25 I, however, will give the government two weeks to

J96Wniss

1 provide me with a revised restitution order that is consistent  
2 not just with the dollar amounts that are set out in the draft  
3 order but with the proposal on pages 32 to 33 of the  
4 presentence report with respect to, among other things, the  
5 payment of 15 percent of gross monthly income towards the  
6 satisfaction of restitution.

7 With respect to a fine, I'm not going to impose a  
8 fine. I am concerned that if I did so, it would interfere with  
9 your restitution payments that simply have to take priority.

10 With respect to the special assessment, I am imposing  
11 a mandatory special assessment of \$100, which shall be due  
12 immediately.

13 Finally, with respect to forfeiture, I'm going to  
14 execute the consent forfeiture order that all parties have  
15 given me.

16 Does either counsel know of any legal reason why the  
17 sentence shall not be imposed as stated?

18 MR. ZOLKIND: No, your Honor.

19 MR. BACHNER: No, Judge.

20 THE COURT: The sentence is imposed as stated.

21 Counsel, are there any open counts?

22 MR. ZOLKIND: No, your Honor.

23 THE COURT: All right.

24 Mr. Nissen, to the extent you have not given up your  
25 right to appeal your conviction and your sentence through your



J96Wniss

1 plea of guilty and the plea agreement you entered into with the  
2 government in connection with that plea, you have a right to  
3 appeal those things, your conviction and your sentence. If  
4 you're unable to pay for the cost of an appeal, you may apply  
5 for leave to appeal *in forma pauperis*. The notice of appeal  
6 must be filed within 14 days of the judgment of conviction.

7 Government, I take it you are comfortable with the  
8 defendant's voluntary surrender.

9 MR. ZOLKIND: We are, your Honor.

10 THE COURT: Mr. Bachner, two things.

11 First of all, do you want me to make a recommendation  
12 to the Bureau of Prisons with respect to the institution in  
13 which he would serve his sentence?

14 MR. BACHNER: Yes, Judge. In order to facilitate  
15 visits and for religious reasons, Otisville would be a  
16 wonderful recommendation, if you could.

17 THE COURT: I take it if Otisville is unavailable,  
18 you'd want as a backup recommendation as close as possible to  
19 the New York area.

20 MR. BACHNER: Yes.

21 THE COURT: All right. What about the surrender date?

22 MR. BACHNER: Your Honor, given the birth of the child  
23 that's expected in about a month, if we could do the first week  
24 of November, that would be great. I know it's a little bit  
25 longer than normal, Judge, but that would be wonderful.

J96Wniss

1 THE COURT: Any objection from the government?

2 MR. ZOLKIND: No objection.

3 THE COURT: Mr. Smallman, a date in the first week of  
4 November.

5 I'm going to direct that Mr. Nissen surrender for  
6 service at the institution designated by the Bureau of Prisons  
7 by 2 p.m. on November the 7th, or as notified by pretrial  
8 services or the probation department. If for some reason an  
9 institution has not been designated, Mr. Nissen, you are to  
10 surrender to the U.S. Marshals in this district on that date  
11 and time unless the Court, in advance, has deferred the  
12 surrender date.

13 Mr. Nissen, your conditions of release continue up  
14 until the time that you report to begin your sentence. If you  
15 fail to report for your sentence, you may be charged with  
16 another criminal offense. Again, if you don't receive notice  
17 of the designated facility to which you're about to surrender,  
18 you need to surrender to the U.S. Marshals by the date and time  
19 I've given you.

20 Anything further from the government?

21 MR. ZOLKIND: No, your Honor.

22 THE COURT: Anything further from the defense?

23 MR. BACHNER: No, your Honor. Thank you.

24 THE COURT: Mr. Nissen, I just want to conclude by  
25 wishing you well. You made a terrible criminal mistake. You

J96Wniss

1 also demonstrated another aspect of your life, real civic  
2 commitment, real commitment, to your friends and family. I  
3 have little doubt that you have gotten the message from this  
4 experience, but I do expect, consistent with what I learned  
5 about you, that while you are in prison and afterwards, you  
6 will be working overtime to repay the restitution debt and to  
7 comport yourself in a way consistent with the expectations that  
8 your friends and family and the Court have for you.

9 You may be seated.

10 With respect to the friends and family that are here,  
11 again, I want to thank you, first of all, for writing me, to  
12 the extent that you did, but I also want to thank all of you  
13 for being here today. Mr. Nissen has a hard road ahead of him.  
14 He will be at one point returning to free society, and he will  
15 need your support to help him rebuild his life and put himself  
16 in a position where he can once again earn money to help repay  
17 the victims. The fact that you're here today tells me you're  
18 in his corner for the long term, and that's encouraging to me.  
19 It gives me confidence that you will steer him right for the  
20 rest of the way.

21 We stand adjourned.

22 (Adjourned)